

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

CHERYL MULDREW, an Individual

Case 15-CA-169007

and

LORRAINE MARKS BRIGGS, an Individual

Case 15-CA-170425

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS, AND GRAIN MILLERS UNION

Case 15-CA-174022

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RESPONDENT SOUTHERN BAKERIES' ANSWERING BRIEF TO  
GENERAL COUNSEL'S CROSS-EXCEPTIONS

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### Introductory Statement

General Counsel's cross-exceptions are based on a misapplication of the law and the evidence. Therefore, they must be rejected by the Board. Southern Bakeries, LLC ("SBC") addresses each of the cross-exceptions in turn.

**I. The ALJ did not err in dismissing complaint paragraph 8(b), because Gloria Lollis confirmed that Human Resources Manager Eric McNiel did not mandate that she keep their conversation confidential. (Cross-Exception 1)**

The first cross-exception relates to the ALJ's dismissal of complaint paragraph 8(b), which alleges that "[a]bout January 21, 2016, [Human Resources Manager Eric McNiel] told employees company investigations were confidential and not to discuss investigations of employee discipline with other employees." (GCX 1(w), ¶8(b).) Citing the testimony of former employee Gloria Lollis ("Lollis"), General Counsel claims that "Lollis repeatedly and consistently testified on both direct examination and cross-examination that during the meeting McNiel instructed her to keep what was said in the office confidential and that it should not go back on the floor." (GC Cross-Exceptions 2.) This is a mischaracterization of Lollis's testimony.

At the hearing, Lollis confirmed her prior statements in an affidavit that "McNiel did not tell me that I wasn't allowed to talk about discipline," and that "McNiel did not tell me that Muldrew shouldn't have been talking about her discipline." (Tr. 79:11-80:11, 81:14-23.) Lollis further testified that McNiel told her that "whatever we say in this office is confidential", (Tr. 79:21-81:3), a statement that was not surprising to Lollis because she believed that employees are entitled to privacy relative to their own discipline. (Tr.82:17-83:4.) To the extent that Lollis's

direct testimony at the hearing could be read to conflict with this testimony, the ALJ appropriately dismissed it as inconsistent with the statements in her affidavit. (ALJ Decision at 9.)

Furthermore, Lollis's statements in her affidavit dovetailed neatly with McNiel's account about what he told employees. McNiel explained that he tells employees that human resources will maintain the confidentiality of information shared with them, but he does not mandate against disclosure by the employees themselves. (Tr.329:8-23.) McNiel's account was corroborated by at least two other disinterested employees called by General Counsel, including Sandra Phillips and Lorraine Marks-Briggs. (Tr.106:3-10, 190:15-18.) These accounts confirm that McNiel's statements to Lollis were completely lawful. Simply advising Lollis that he would keep what she told him confidential was not a violation of her Section 7 rights. Therefore, that charge was appropriately dismissed by the ALJ.

**II. The ALJ correctly upheld SBC's rule banning cameras or video recording devices inside its facility. (Cross-Exception 2)**

The remainder of General Counsel's cross-exceptions relate to SBC's work rules that were upheld by the ALJ. In addressing those cross-exceptions, the principles set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd*, 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), apply generally to each of these cross-exceptions. As such, a review of the standards from those cases is appropriate at the outset.

An employer violates Section 8(a)(1) of the NLRB when it maintains a work rule that reasonably tends to chill employees in their exercise of Section 7 rights.

*Lafayette Park Hotel*, 326 NLRB at 825. Evaluating the lawfulness of an employer’s work rules requires balancing competing interests. *Id.* That inquiry entails “working out an adjustment between the undisputed right of self-organization assured to employees under the [law] and the equally undisputed right of employers to maintain discipline in their establishments.” *Id.* (citation omitted).

In determining whether a challenged rule is lawful, the rule must be given a reasonable reading. *Lutheran Heritage*, 343 NLRB at 646; *Lafayette Park Hotel*, 326 NLRB at 827. Phrases must not be read in isolation and it must not be presumed that the rule improperly interferes with employee rights. *Id.* at 825, 827. The inquiry with regard to whether a challenged rule is unlawful begins with whether the rule explicitly restricts activity protected by Section 7 of the NLRA. *Lutheran Heritage*, 343 NLRB at 646. If the rule does not explicitly restrict activities protected by Section 7, it is unlawful only if: (1) the rule was promulgated in response to union activity; (2) employees would reasonably construe the language to prohibit Section 7 activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. Speculation is not permitted “in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.” *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005).

In the instant case, it is undisputed that all of the rules at issue in the cross-exceptions do not explicitly restrict Section 7 activity, were not promulgated in response to union activity, and have not been used to restrict the exercise of Section

7 rights. Indeed, the rules are facially neutral. They were enacted pursuant to the management rights provision of the CBA, which was negotiated between the Union and SBC more than a decade ago when the Union used to represent SBC's production employees. (Tr.297:16-298:3.) And the undisputed evidence demonstrates that these rules have not been used to restrict any employees' Section 7 rights. (Tr.298:4-7.) Thus, the only remaining issue is whether any of the rules can reasonably be read by employees to prohibit exercise of their Section 7 rights.

In the second cross-exception, General Counsel challenges the ALJ's finding that a workplace rule against the use of cameras or imaging devices in the workplace was not unlawful. SBC's employee handbook states:

Employees, contractors, and visitors may not carry cameras into any [SBC] facilities. This includes: 1. Conventional film, still cameras[;] 2. Digital still cameras[;] 3. Video cameras[;] 4. PDA cameras[;] 5. Cell phone cameras[.] An employee with authorization to take pictures in the facility must sign in at the front reception desk and be given a Photographer's Pass. This pass must be worn at all times while shooting pictures. A [SBC] management employee must accompany the employee.

(JX 2 at p.12.)

The ALJ did not err in finding that this rule was lawful. Taking into account this Board's decisions in *Flagstaff Medical Center*, 357 NLRB 659 (2011), *Rio All-States Hotel & Casino*, 362 NLRB No. 190 (2015), and *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), the ALJ appropriately credited the business justification behind the rule:

With regard to the ban on photography, I find this case more similar to *Flagstaff Medical Center* than the other relevant Board cases mentioned above. [SBC] has established a pervasive and compelling

interest in its proprietary information. In particular, [SBC] has established a compelling interest in not allowing photographs that might reveal its production of baked goods pursuant to co-manufacturing agreements with other companies. If for example, [SBC] produces Hostess cupcakes at its Hope facility, Hostess and [SBC] have a pervasive interest in not revealing this to competitors of both companies and the public. Since the break rooms at the Hope facility have windows looking out into the production areas, I find [SBC] has a compelling interest in forbidding photography even in the break rooms.

(ALJ Decision at 12.)

This conclusion was well-supported by the testimony of Rickey Ledbetter, SBC's General Manager and Executive Vice President, who testified without contradiction that the workplace rule protects the security of company trade secrets, confidential and proprietary information, and internal processes occurring inside the manufacturing facility. (Tr.288:3-289:19.) In particular, SBC has co-manufacturing and non-disclosure agreements with a number of customers, whereby SBC promises not to disclose their proprietary processes, formulas, or even that it produces those customers' products. (*Id.*) The ingredients and processes used in manufacturing SBC's products are valuable and legitimate interests that SBC must protect for the livelihood of its business and for compliance with confidentiality agreements with clients. This interest in protecting proprietary information extends to all areas of the facility, because product manufactured by SBC that contains labeling for another company may end up in those other areas of the plant. (Tr. 308:5-13.)<sup>1</sup>

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<sup>1</sup> The evidence also established that this rule is justified interests in protecting food safety, as it prevents foreign contaminants, such as a cell phone, from falling into

General Counsel puts forward several different challenges to the ALJ's analysis. First, General Counsel seeks to differentiate *Flagstaff*, contending that that decision's focus on protecting patient privacy interests is not implicated in SBC's commercial bakery. (GC Cross-Exceptions 8.) However, as the ALJ correctly held, SBC "established a pervasive and compelling interest in its proprietary information." (ALJ Decision at 12.) Indeed, SBC's co-manufacturing and non-disclosure agreements with customers require that it maintain the secrecy of its company trade secrets, confidential and proprietary information, and internal processes. In this way, the interest in guarding against industrial espionage is entirely distinguishable from *Whole Foods* and *Rio All-States Hotel*, cases which involved a grocery store and a casino that were open to the general public, and where the situations involved confidential information that was much more limited or not present at all. *See Whole Foods*, 363 NLRB No. 87 at \*4 (finding justification for workplace rule against video recording to protect personal information about team members and business strategy was "not without merit," but was based on relatively narrow circumstances, such as when the company held annual town hall meetings or conducted termination-appeal peer panels); *Rio All-States Hotel & Casino*, 362 NLRB No. 190 at \*4 (finding recording device ban that was not "tied . . . to any particularized interest, such as the privacy of its patrons", was unlawful).

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the food product, (Tr.289:19-22), and that it helps to protect the privacy of employees who may or may not want to be photographed or recorded. (Tr.288:25-289:2.) The ALJ did not consider these additional bases for upholding the rule.

Next, the General Counsel concedes that SBC “has a legitimate interest in protecting its propriety information and processes,” but argues that the total ban on photography “is not narrowly tailored to protect its legitimate interests and is reasonably construed to restrict employees’ Section 7 rights.” (GC Cross-Exceptions 8.) The General Counsel contends that the ALJ failed to address why the photography ban would be justified in other non-production areas of the facility. (*Id.* at 9.) To the contrary, the ALJ recognized that, because of the nature of its co-manufacturing agreements with certain customers, SBC has “a pervasive interest in not revealing” this relationship to competitors of both companies and the public. (ALJ Decision at 12.) The uncontradicted testimony established that this interest extended to all areas of the plant, not just the production floor. (Tr. 308:5-13.)

Finally, General Counsel suggests in passing that employees “would reasonably construe this rule to preclude them from using a cell phone to engage in Section 7 related communications” during their shift or during breaks or meal periods. (GC Cross-Exceptions 7-8.) This simply ignores the record: Ledbetter testified, again without contradiction, that cell phones are allowed in the employee break room and that employees may use them to “conduct whatever business they want.” (Tr. 302:21-303:20.)

In sum, the ALJ appropriately analyzed the rule relating to photography and video recording, and his Decision should be upheld in that regard.

**III. The workplace rule against video recording devices on SBC's premises, in a company-supplied vehicle, or off premises while on company business, is not unlawful. (Cross-Exception 3)**

The employee handbook includes a second provision relating to recording devices, which prohibits:

[the] [u]nauthorized use of still or video cameras, tape recorders, or any other audio or video recording devices on Company premises, in a Company-supplied vehicle, or off-Company premises involving any current or former employee, without such person's expressed permission while on Company business.

(JX 2 at p.18.)

On its face, this rule addresses three scenarios whereby photography and recording are prohibited or limited. The first two clauses address employees while on company premises and while in a company-supplied vehicle. In line with the analysis above, these clauses protect valuable and legitimate business interests and cannot be reasonably read to imply that SBC is seeking to squelch employees' Section 7 rights. Employees would reasonably interpret these clauses of the rule as a legitimate means of protecting the above-mentioned interests of SBC because the integrity of SBC's manufacturing process, food safety, and the safe operation of motor vehicles are stressed in employee training, monitored for quality control purposes, and governed by state and federal law. An employee could not reasonably construe this rule as a prohibition of protected activity. Thus, the ALJ appropriately upheld this rule as it works to protect valid business interests, including the security of company trade secrets, confidential and proprietary information, and internal processes occurring inside the manufacturing facility. (ALJ Decision 11-12.)

The third clause involves employees doing company business while off-company premises and is modified by requiring the express permission of a co-employee or former co-employee being photographed or recorded. There is nothing therein that restricts an employee's Section 7 rights explicitly or in practice. Rather, it solely promotes and protects employee rights to privacy and is narrowly tailored to protect those rights. Bakery management and supervision is not involved in whether the audio or video recording can occur. The only consent required is from the employee(s) being recorded and, therefore, the Bakery cannot possibly interfere (or be perceived as wanting or intending to interfere) with employees' Section 7 activities. Thus, employees' rights to engage in activity protected under Section 7 are not hindered and instead are arguably facilitated by the clause.

If the recording or photograph is of another employee, this clause encourages employees to speak with the person(s) they are seeking to record, which may facilitate discussion of potential adverse work conditions, unequal treatment, or organized efforts to mobilize labor. What is more, the clause actually protects picketing employees or employees engaging in protected rights insofar as it prevents employees who are anti-union from photographing or recording employees for nefarious purposes who are exercising valid Section 7 rights.

A rule giving employees the right to control who records them would more likely be viewed as respecting, not undermining, employee Section 7 rights. There is no chilling effect on an employee's Section 7 rights by the existence or application of

this clause. Therefore, Group A, Rule 12 cannot be reasonably read by an employee as a curtailment of Section 7 rights, and there can be no finding of unlawfulness.

**IV. The ALJ did not err in upholding the language that introduces Group A violations in the workplace rules. (Cross-Exception 4)**

The introductory paragraph of SBC's work rules listing Group A violations includes the following language that was found lawful by the ALJ:

GROUP A. These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. Any conduct, which could interfere with or damage the business or reputation of the Company or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge.

(JX 2 at p.17.) Following this introductory language, a listing of twenty-two different types of infractions is provided. (*See id.* at pp.17-18.)

General Counsel argues that this introductory paragraph is unlawful, asserting that it is "overbroad as it provides no examples or context that would suggest the provision is only aimed at unprotected conduct." (GC Cross-Exceptions 11-12.) This argument should receive short shrift; a plain reading of the Group A violations listed in the work rules demonstrates that a list of examples *is* provided that shows that the rule is only aimed at unprotected conduct. (*See* JX 2 at p.17-18.)

Similar language was upheld in *Ark Las Vegas Restaurant Corp.*, 335 NLRB at 1284 n.2, 1291-1292 (2001), which addressed rules that prohibited "[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or department of the Company" and "[p]articipating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow

associates, the Company, or its guests, or that adversely affects [sic] job performance or your ability to report to work as scheduled.” In *Ark Las Vegas*, as here, employees who were represented by a union during the promulgation of these rules “won’t interpret the rule as having any application to a labor dispute.” *Id.* at 1291. See also *Lafayette Park Hotel*, 326 NLRB at 825-827 (addressing rule with similar language and finding that “[e]mployees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act”); *Albertson’s Inc.*, 351 NLRB 254, 258-59 (2007) (reaching similar outcome).

As a result, this case is nothing like the standalone “discourtesy policy” in *Boch Honda*, 362 NLRB No. 83 (2015), the standalone “courtesy” policy in *Karl Knauz Motors, Inc.*, 358 NLRB 1754, 1754-55 (2012), or the bullet-points against “disloyalty” in *First Transit, Inc.*, 360 NLRB 619, 619 n.5 (2014), in the Board cases cited by General Counsel. The ALJ appropriately dismissed this charge, and this cross-exception should also be denied.

**V. The ALJ rightly upheld the rule prohibiting off-duty conduct which could impact or call into question the employee’s ability to perform his or her job. (Cross-Exception 5)**

Group A, Rule 9 prohibits employees from engaging in “[a]ny off duty conduct, which could impact, or call into question the employee’s ability to perform his/her job.” (JX 2 at p.18.)

The purpose of Group A, Rule 9 is to protect SBC when employees engage in activity outside of work that compromises their capability or qualification for their position such that it would no longer be safe or otherwise appropriate for them to

perform it. (Tr.293:8-23.) For example, if an employee engages in a crime of violence or theft, the Company would not allow that employee back into its facility for the safety of other employees or its property. (Tr.293:19-23.) Likewise, if an employee engages in acts of moral turpitude outside of work (such as the recent allegations of sexual harassment and abuse against Harvey Weinstein), it would reasonably raise questions whether the employee's misconduct precludes him from continuing to work at the Company. (Tr.294:6-13.) The ALJ correctly upheld this rule. *See also Flamingo Hilton-Laughlin*, 330 NLRB 287, 289 (1999) (finding rule concerning "off-duty misconduct," which included misconduct that "materially and adversely affects job performance" or that "tends to bring discredit to the Hotel" was not unlawful); *Lafayette Park*, 326 NLRB at 824-25 (upholding rule that prohibited "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community").

Citing *Tradesmen International*, 338 NLRB 460, 461-62 (2002), the General Counsel argues that the rule is unlawful because it "contains no limiting language or examples which would allow employees to understand that this rule would not encompass activities protected by Section 7." (GC Cross-Exceptions 13.) To the General Counsel, the rule is "so broad and amorphous that a reasonable employee would interpret it to include any perceived disloyal conduct." (*Id.*)

This argument was rightly rejected by the ALJ, who noted that *Tradesmen International* was decided before *Lutheran Heritage* and is inconsistent with the

standard set forth in that decision. The ALJ correctly held under *Lutheran Heritage*, that “where a rule has not been promulgated in response to protected activity, has not been applied to restrict Section 7 rights and does not explicitly restrict protected rights, there must be some specific reason advanced for why a reasonable employee would construe the language to inhibit Section 7 rights.” (ALJ Decision 10-11.) Applying that standard, there is nothing in Group A, Rule 9 that explicitly (or even implicitly) restricts activities protected by Section 7. Instead, this rule is narrowly focused on outside activities that affect an employee’s “ability” to perform his or her job. Logic dictates that engaging in protected concerted activity off duty, such as discussing terms and conditions of employment outside work or joining a union or attending union meetings, does not affect an employee’s “ability” (or capability) to perform his or her job duties.

In short, no reasonable employee would view this rule as chilling his or her right to engage in protected activity. Therefore, the ALJ correctly determined that Group A, Rule 9 is lawful, and this determination should also be upheld.

**VI. The ALJ correctly upheld the workplace rule prohibiting unauthorized entry into the facility by employees. (Cross-Exception 6)**

In a final challenge to the work rules, General Counsel contends that the language in Group B, Rule 7, prohibiting “[u]nauthorized plant entry by employee,” (JX 2 at 19), should have been struck down. This argument also lacks merit.

As set forth in General Counsel’s brief, a no-access employee policy is lawful if it “(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-

duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.” *Tri-County Medical Center*, 222 NLRB 1089, 1090 (1976). The General Counsel concedes that the first two elements have been met, but argues that the rule is unlawful because “there is no blanket prohibition of such access for off-duty employees for any purpose.” (GC Cross-Exceptions 15.)

To the contrary, the language in Group B, Rule 7 *does* provide a blanket prohibit of access to off-duty employees, as they are not authorized to be in the plant. (See Tr.296:23-24 (“If you’re off duty, there’s no business reason for you to re-enter the facility.”).) This rule against unauthorized access to the facility comports with the SQF Code, a code promulgated by the SQF Institute and that outlines specific good manufacturing processes. (Tr.283:23-285:14, 286:6-15; EX 14.) The SQF Code requires that a food manufacturer document and implement a Food Defense strategy to “prevent[] food adulteration caused by a deliberate act of sabotage or terrorist-like incident,” to include protocols concerning “[t]he methods implemented to ensure only authorized personnel have access to . . . manufacturing and storage areas through designated access points” and “[t]he methods implemented to record and control access to the premises by employees, contractors, and visitors.” (EX 14 at p.66 (§ 2.7.1).) The language of Group B, Rule 7 is founded upon that mandate.

Under *Diamond Shamrock Co. v. NLRB*, 443 F.2d 52 (3d Cir. 1971), the Third Circuit distinguished rules that prohibit access to plant areas for solicitation by on-duty employees and off-duty employees, finding that a rule prohibiting the former

from being on the premises is improper and overbroad, but a rule banning the latter may be justified as a valid business practice. *Id.* at 55-56. Here, employees who are on duty are authorized to be at the facility and in the plant. The rule only affects unauthorized employees and is appropriately aimed at maintaining a secure facility, preventing unnecessary distractions, protecting the company's confidential and proprietary information, and safeguarding the integrity of the production process. (*See* Tr.296:17-297:10.)

In sum, this rule does not interfere with valid Section 7 organizational rights of employees. It has not been used to curtail employee rights, was not created in response to union activity, and cannot be reasonably read by an employee to restrict Section 7 rights. For all of these reasons, this rule is not overbroad and has no chilling effect on employee rights under the Act.

**VII. The General Counsel's request for "consequential damages" is inappropriate and contradicts well-established law. (Cross-Exception 7)**

In its final cross-exception, General Counsel asks this Board to depart from its "present remedial approach," arguing that it does not "adequately remed[y]" the alleged ULPs in this case. (GC Cross-Exceptions 16.) Cutting and pasting from General Counsel's Memorandum OM 16-24 (July 28, 2016), General Counsel asks the Board to issue a "specific make-whole remedial order in this case, and all others," to require respondents to compensate employees for "all consequential economic harms sustained" as a result of alleged ULPs. (*Id.* at 17.)<sup>2</sup>

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<sup>2</sup> General Counsel failed to identify or present any evidence of consequential damages at the hearing. Thus, any discussion of consequential damages in this case

The ALJ appropriately dismissed this request. “[T]he Board does not traditionally provide remedies for consequential economic harm in its make-whole orders.” *Spectrum Juvenile Justice Servs.*, 07-CA-155494, 2017 WL 4571180 (NLRB Div. of Judges Oct. 11, 2017) (citing *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963)). This Board should not disturb its longstanding, well-established precedent.

The statutory language and United States Supreme Court precedent corroborate the Board’s settled position. “As a creature of statute the Board has only those powers conferred upon it by Congress.” *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016). Section 10(c) of the National Labor Relations Act states that, if the Board makes a finding of an ULP, “then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.” 29 U.S.C. § 160(c). “In order to effectuate the policies of the Act, Congress has allowed the Board, in its discretion, to award back pay. Such awards may incidently [sic] provide some compensatory relief to victims of unfair labor practices. This does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern of money damages for private injuries.” *Automobile Workers v. Russell*, 356 U.S. 634, 645 (1958).

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is entirely academic because any order requiring SBC to compensate for any such alleged damages is based purely on speculation rather than the evidence.

Rather, “[t]he power to order affirmative relief under [§] 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.” *Id.* at 642–43. “The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws. While a prayer for ‘complete relief’ might find a receptive ear in a court of general jurisdiction, it is well settled that there are wide differences between administrative agencies and courts.” *Shepard v. NLRB*, 459 U.S. 344, 351 (1983).

Here, the sorts of “consequential economic harm” sought to be reimbursed by General Counsel far exceeds this statutory language, ignores this direction from the Supreme Court, and is indicative of General Counsel’s overreaching. For example, General Counsel suggests that “if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car from the employee.” (GC Cross-Exceptions 18-19.)

The absurdity of General Counsel’s position is manifest from the very examples it cites. How can the Board determine whether spending money elsewhere, other personal crises, or living beyond one’s means caused the late fees,

foreclosure expenses, and similar consequential losses rather than the loss of a job or lengthy suspension at issue in the case? To adopt the kind of overreaching remedies General Counsel is suddenly contemplating after decades of understanding the restricted parameters of the Board's remedial authority would protract every hearing into endless testimony regarding what kind of harm the employee actually suffered as a consequence of the employer's alleged unfair labor practices rather than caused himself separate and apart from the job or period-of-employment loss. For example, if one employee prudently maintained six months of savings to cover any unexpected periods of unemployment such that no additional costs were incurred by the impact of the employer's unlawful conduct, should another employee be rewarded for the cliff he was pushed over because of his own financial shortsightedness or lack of resource husbandry? And what speculation must go into determining whether that employee would have otherwise suffered the same losses within the same timeframe even if she had continued to draw a paycheck at the time of the late fee, foreclosure, or other personal financial loss? What if she was just spending her money in other ways or recently suffered the financial impact of a contentious divorce? The General Counsel's wish to turn the Board into a personal injury lawyer at the remedial stage of any ULP case fully misunderstands the intended remedial nature of the NLRA and would amount to a giant waste of taxpayer dollars and agency resources.

Stated otherwise, in asking for the Board to authorize these sorts of damages, General Counsel is calling upon the Board to take on the role of a court and seeking

to remedy private injuries, rather than effectuate the policies of the Act. *Cf.* 29 U.S.C. §151 (setting forth the declaration of policy concerning the Act). This far exceeds the call or statutory authority of this Board, and would amount to a complete departure from its prior precedent. Indeed, adopting General Counsel’s position would mire this Board in personal financial matters relating to employees’ mortgages, vehicle payments, credit issues, and personal spending decisions, rather than on focusing on the primary objectives of the Board to “encourag[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing.” *Id.*; *see also Russell*, 356 U.S. at 645-46 (noting that “medical expenses, pain and suffering and property damages . . . . are beyond the scope of present Board remedial orders”); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951) (noting that “no consideration has been given *or should be given* to collateral losses in framing an order to reimburse employees for their lost earnings” (emphasis supplied)).

There is absolutely no reason for the Board to depart from the position that it has maintained for more than half a century. The ALJ appropriately dismissed this request by General Counsel. The Board should not disturb that part of his decision.

### **Conclusion**

Respondent Southern Bakeries, LLC respectfully requests that the Board deny General Counsel’s cross-exceptions *in toto*.

Respectfully submitted,

s/ David L. Swider

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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 31, 2017, a copy of the foregoing “Respondent Southern Bakeries’ Answering Brief to General Counsel’s Cross-Exceptions” was filed electronically with the National Labor Relations Board and has been served upon the following by email:

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| Cheryl Muldrew<br>704 North Hazel Street<br>Hope, AR 71801-2816 | Lorraine Marks Briggs<br>405 Red Oak Street<br>Lewisville, AR 71845-7834 |
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| Anthony Shelton<br>Bakery, Confectionary, Tobacco<br>Workers, and<br>Grain Millers Union<br>1718 Ray Joe Circle<br>Chattanooga, TN 37421-3369 | Anthony Shelton<br>Bakery, Confectionery, Tobacco and<br>Grain Millers Union, Local 111<br>137 Sycamore School Road #104<br>Ft. Worth, TX 76134-5026 |
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*s/David L. Swider*

David L. Swider

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